BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking on the Commission's own motion for the purpose of considering policies and guidelines regarding the allocation of gains from sales of energy, telecommunications, and water utility assets.	Rulemaking 04-09-003 (Filed September 2, 2004) (Phase Two)

COMMENTS RE THE PROPOSED DECISION AND THE ALTERNATE BY THE DIVISION OF RATEPAYER ADVOCATES

1. INTRODUCTION

Pursuant to the Commission Rules of Practice and Procedure, Rule 14.3, subsection (a), the Division of Ratepayer Advocates (DRA) hereby submits its comments on the Proposed Decision (PD) and the Alternate. In summary, DRA supports the PD's provision imposing "an approval requirement for water companies selling CIAC property they contend is subject to Section 790": *provided that* the Commission also explicitly states that the burden of proof for demonstrating the property is eligible for Section 790 treatment is on the utility. In addition, the PD should be modified to prohibit water utilities from proving their case in rebuttal instead of their initial application.

Further, DRA supports the Alternate's legal interpretation of Section 790, i.e.,, it does not apply to the three types of condemnations in question. The PD's position on Section 790 regarding condemnation issues is inconsistent with the declared legislative intent of Section 789.1 and the basic terms in Section 790.

2. DRA COMMENTS

2.1 Definition of "major facility" for water utilities needs clarification

For Section 455.5 reporting purposes, the PD defines a "major facility" of a water utility as

> a facility or combination of facilities, such as wells, interconnections, surface water diversion structures, and/or treatment facilities, that . . . has a Net Plant Value of at least $3,000,000 in the case of a Class A water company, or $2,000,000 in the case of a Class B water company.[1]

However, the PD does not specify whether the $3 million Net Plant Value threshold is based on a water utility's service district or Company-wide including all districts. DRA recommends basing such thresholds on the number of connections in a service district, because the cost of service ratemaking is based on a service district. Further, some Class A water utilities have districts which have much less than 10,000 service connections and could be considered Class B or C on a stand alone basis. Under the PD's $3 million threshold stated above, these small service districts in a Class A water utility would not likely be reported. Therefore, DRA recommends that the following Net Plant Value thresholds for water utilities:

- Net Plant Value of $2 million for each Class A water utility service district having more than 10,000 service Connections;
- Net Plant Value of $1 million for Class A and Class B water utility service districts having 2,000 to 10,000 service connections; and
- Net Plant Value of $500,000 for Classes A – D water utility service districts with less than 2,000 service connections.

2.2 PD leaves the question of the burden of proof unresolved.

The PD requires the following regarding the sale of CIAC property:

> Any water company that sells real property that a developer contributed to the water company in aid of construction (CIAC property) which it claims or will claim is subject to Section 790 shall seek leave from the Commission to do so. In so doing, the water company shall prove that the property is no longer necessary or useful and that the sale is not intended merely to gain an opportunity for the water company to earn a rate of return on infrastructure purchased with the

[1] PD at 15–16.

> sale proceeds. The water company shall seek such approval by application or Advice Letter prior to any such sale, and may not make the sale without Commission authorization.

While the PD's phrase "the water company shall prove" may indicate the burden of proof is on the water utility, that burden should be comparable to what the Commission established in the Rate Case Plan, D. 04-06-018, to wit:.

> The utility bears the burden of proving that its proposed rate increase is justified and must include in the PA [i.e., Proposed Application] all information and analysis necessary to meet this burden.[2]

In DRA's experience, water utilities often ignore the burden of proof requirement quoted above. Many will wait for DRA to show its hand in prepared direct testimony and then present the utility's case in chief on rebuttal. This violates DRA's and the ratepayers' right to fair notice and due process. The Commission should make the Rate Case Plan's proof requirement meaningful, which should also be applied to the Advice Letter process under the pending ALJ Resolution-202 that the PD incorporates as a part of the "approval requirement" for the sale of CIAC property.

2.3 The PD's opinion that Section 790 applies to condemnations and inverse condemnations lacks legal support and appears arbitrary, and capricious.

The PD states that the "key question is whether a condemnation is a 'sale' covered by Section 790"[3] and conflates all other legal considerations into that one narrow view. For example, the PD begins by citing Black's Law Dictionary to generically define the term "sale," as follows:

> Black's Law Dictionary defines a "sale" as the "transfer of property or title for a price." A "price" is the "amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold." Condemnations by eminent domain, inverse condemnations, and sales in anticipation of condemnation all

[2] *Rate Case Plan,* D. 04-06-018 at App., sec. C, p. 11, mimeo.

[3] PD at 24.

> fall within the definition of "sale," as they each involve the transfer of property in exchange for some consideration, usually monetary.[Footnotes omitted.][4]

Next, the PD cites certain past Commission decisions as supporting its claim that Section 790 applies to condemnations or inverse condemnation, because these decisions use the term "condemnation sales" or interchangeably the terms "condemnation" and "sale."[5] Further, because (i) the language of Section 790 makes no distinction between voluntary and involuntary sales and (ii) condemnations and inverse condemnations constitute a "sale," the PD concludes on such bases that Section 790 applies to such legal actions.

First, the Black's Law Dictionary and Ballantine's Law Dictionary define "condemnation" as, respectively, "[t]he inherent power of a governmental entity to take privately owned property . . . and convert it to public use"[6] or "[t]he taking of private property for public use through the exercise of the power of eminent domain."[7] Therefore, condemnations are takings of water utility owned property initiated by a governmental agency, while such property may be still necessary or useful to the utility at the time, notwithstanding the element of a "sale" in such legal actions.

While the PD proclaims Section 790 makes no distinction between voluntary and involuntary sales, it fails to take into account Section 789.1, subsection (d), the State Legislature's Findings and Declarations regarding Section 790, as follows:

> Water corporations may, from time to time, own real property that once was, but is no longer, necessary or useful in the provision of water utility service and that now may be sold. It is the policy of the state that water corporations *be*

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[4] *Id.* at 26.

[5] *Id.* at 27 at nn.39–41.

[6] Black's Law Dictionary at 287 and 541 (respectively, definition of "condemnation" and "eminent domain") (7th ed. 1999).

[7] Ballantine's Law Dictionary (1969), available at <https://www.lexis.com/research/retrieve/frames?_m=4693231c3c065b9da5e90c5ec8fed895&csvc=bl&cform=bool&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLzVlz-zSkAA&_md5=fa30c02e286018a74a280634bbaabf45>

> *encouraged to dispose* of real property that *once was, but is no longer, necessary or useful in the provision of water utility service*.

As the Alternate found, when a governmental entity "takes" a water utility owned property under any of the three types of condemnations mentioned in this proceeding, such legal actions cannot be viewed as under any circumstances as the encouragement that the State Legislature intended to promote by enacting Section 790. The PD's failure to distinguish between types of "sales" (whether forced or voluntary) is therefore inconsistent with the Legislative intent behind Section 790 and supports the more reasonable views of the Alternate, which are as follows:

> There is no way to encourage water companies to dispose of real property through condemnation, since the impetus for condemnation (including inverse condemnation) comes from an outside agency and not the utility itself. We conclude that the Infrastructure Act applies only to voluntary acts by a water company.[8]

Even more saliently, the PD's exclusive focus on the term "sale" disregards a basic requirement of Section 790: i.e., "real property that *once was, but is no longer, necessary or useful in the provision of water utility service*."[9] Each Commission decision cited by the PD, however, involved the condemnation of real property that apparently was necessary or useful to the water utility service when they were taken by condemnation.[10] Therefore, if the only issue for Section 790 purposes were whether a "sale" occurred, Section 790 would apply to the "sale" of real property that is necessary

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[8] Alternate at 24.

[9] Secs. 789.1(d) and 790(a).

[10] *See* PD at 27 n.39 (citing *S. Cal. Water Co.*, 1990 Cal. PUC LEXIS 95, at *34 (1990) (La Quinta distribution system at time of condemnation "(1) was operated separately from the other two systems of the Desert District, (2) was not interconnected with the other systems, (3) was separately tariffed, and (4) was a relatively small part of the overall SoCalWater utility system"); *id.* at n.40 (citing *OII re Park Water Co.*, 1998 Cal. PUC LEXIS 818, at *3-*4, *11(1998) (condemnation proposed to transfer to City of Bell all of its lands, property, and rights within the city limits, including pumping rights; no findings of any real property transferred no longer necessary or useful to utility); *id.* at n.41 (citing *So.Cal. Water Co.*, 1995 Cal. PUC LEXIS 626, at *10-*11(1995)(no finding that water system transferred to Bay Point in an eminent domain action was no longer necessary or useful).

and useful to the water utility service even though it is involuntary and was the result of a condemnation action. However, the language of Section 790 is explicit: it only applies to real property that is no longer necessary or useful at the time of sale. The PD's interpretation of Section 790 is legally unsupportable. The Commission should give the greater weight to the Alternate which is more reasonable and inclusive analysis of Section 790's application to the three type of condemnations in question.

3. CONCLUSION

The Commission should supplement the PD's "approval requirements" by explicitly describing the utility's burden of proof as the same or analogous to that stated in the Rate Case Plan, D. 04-06-018. The Commission should state its intention to impose fines, penalties, and evidentiary sanctions if the water utility sandbags DRA in rebuttal with new information that could have been presented at the time of its application or Advice Letter filing.

Regarding Section 790, the Alternate's interpretation of this statute is more reasonable and consistent with legislative intent than the PD. The PD's intent that Section 790 applies only to sales, regardless of whether they are voluntary or involuntary, is inconsistent with Legislative intent. Further, the PD anomalously would have Section 790 apply to sales of real property that is still necessary and useful to the water utility service, contrary to a basic term of Section 790. The PD is legally unsupportable. The

Commission should instead adopt the Alternate presents the more reasonable view that Section 790 does not apply to condemnations.

Respectfully submitted,

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August 22, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **"COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE PROPOSED DECISION AND THE ALTERNATE DECISION** in **R.04-09-003** by using the following service:

[x] **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed on August 22, 2007 at San Francisco, California.

/s/ HALINA MARCINKOWSKI
Halina Marcinkowski

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